TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 171.

LA FAYETTE B. EATON, APPELLANT AND PLAINTIFF IN ERROR,

vs.

HARRISON H. BROWN AND IRA DORRANCE.

APPEAL FROM AND IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 17, 1903.

(18,754.)

16120

(18,754.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 171.

LA FAYETTE B. EATON, APPELLANT AND PLAINTIFF IN ERROR,

vs.

HARRISON H. BROWN AND IRA DORRANCE.

APPEAL FROM AND IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from supreme court of the District of Columbia	1	1
Will of Caroline Holley	1	1
Affidavit of La Fayette B. Eaton	1	1
Amended petition of La Fayette B. Eaton	1	1
Order granting leave to file amended petition	3	3
Caveat	4	4
Answer of H. H. Brown to amended petition	5	5
Stipulation of counsel as to facts	6	6
Order refusing probate and record to paper-writing propounded by La Fayette B. Eaton as last will and testament, dismissing petition, and appeal by petitioner	7	7
Order for transcript of record	7	8
Certificate of register of wills	8	8
Minute entry of argument, &c	9	9
Opinion	10	9
Decree	14	15
Order allowing writ of error and appeal	15	16
Writ of error	16	16
Bond on writ of error and appeal	17	16
Citation on appeal	18	18
Citation on writ of error	19	18
Clerk's certificate	20	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 2, 1903.

ident of the city of Washington in the District of Columbia, departed this life in the last-named city and District on or about the 17th day of December, 1901, the said decedent having been an employé of the United States Treasury Department from April 14, 1883, to the time of her death, being at the time of her death over 70 years of age.

3. The said Caroline Holley, during the last two or three years of her life, often spoke of its being her intention to leave whatever property she was possessed of at the time of her death to the petitioner, Lafayette B. Eaton, and to the Methodist church at her old home in Bloomingburgh, New York, from which church she never removed her membership, and from which church, by the way, her body, removed from Washington, was taken for interment in the cemetery hard by.

And the said decedent, during the last two or three months of her life often spoke of having made her will, saying that the will was among her papers and that it showed how she wanted her property to go.

4. The only paper in the nature of a last will and testament left by the said decedent, as disclosed by diligent search among her papers, is the one in her own handwriting, bearing date the 31st day of August, 1901, and now on file in the office of the register of wills of the District of Columbia. In the said paper-writing which was left by the said decedent as her last will and testament, no person is named as executor, but the petitioner herein is named as the sole residuary legatee.

5. The said decedent left surviving her the following persons, all adults, who constitute her heirs-at-law and next of kin, their names, residences, and relationship to the decedent being as follows:

Name.	Relationship.	Residence.
Harrison H. Brown	Cousin	Winterton, N. Y.
Ira Dorrance	"	Middletown, N. Y.
Winthrop Dorrance	"	" " "
James L. Beyea	"	217 2d Ave., N. Y.
Archibald A. Beyea	"	Harrison, N. Y.
Phœbe Beyea	"	" " "
Henry Beyea	"	Dunmore, Pa.
John Wilkin	"	Crystal Run, N. Y.
Susan Pierson	"	217 2d Ave., N. Y.
Mary Ann Millspaugh	"	Sulphur Springs, Ark.

6. The said decedent left personal property of the value of about $5500, the same consisting of cash in bank (about $1,000), promissory notes (secured to the extent of $2500), and four $1,000 railroad bonds of the value of about $2,000. And the decedent left no debts payable from her estate except the expenses of her last illness and burial.

3 The petitioner is informed and believes that the said decedent was entitled at the time of her death to an interest in some land in the city of Washington, in the District of Columbia, now standing in the name of Octave B. Van Wycke, the exact location, description and value of which the petitioner is unable to state, although he is informed that the said land is worth about $1,500.

7. The petitioner further says that he is informed and believes that this honorable court has jurisdiction to take the proof of said last will and testament of the said Caroline Holley, deceased, and the power of granting letters of administration *cum testamento annexo* and he is desirous that such proof be taken and such letters granted.

Wherefore the petitioner prays:

1. That a citation may issue out of this honorable court directed to the proper persons, requiring them and each of them to appear and attend the probate of said last will and testament.

2. That the said last will and testament may be admitted to probate and record as a will of personal property.

3. That letters of administration *cum testamento annexo* may be issued to the petitioner upon his giving bond in such sum as may be fixed by this honorable court.

4. That such other and further relief may be had as the nature of the case shall require and to the court shall seem fit.

LA FAYETTE B. EATON.

JOS. A. BURKART,
J. ALTHEUS JOHNSON,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the foregoing petition by me subscribed and know the contents thereof, and that the matters and things therein stated upon my personal knowledge are true, and that those stated upon information and belief I believe to be true.

LA FAYETTE B. EATON.

Subscribed and sworn to before me this 6th day of February, 1902.

[SEAL.] S. OLIVIA MOORE,
Notary Public, D. C.

Leave to file this amended petition is hereby granted, a copy of the petition, as thus amended, to be served on each of the parties, or his attorney of record, who has appeared in these proceedings to object to the probate and record of the paper-writing herein propounded as the last will and testament of Caroline Holley, deceased.

Feb'y 10, 1902.

JOB BARNARD, *Justice.*

(Endorsement: Amended petition of Lafayette B. Eaton, Filed Feb. 10, 1902, Louis A. Dent, register of wills, clerk of probate court, D. C.)

4 In the Supreme Court of the District of Columbia.

In re Estate of CAROLINE HOLLEY, Deceased. No. 10544.

The petition of Ira Dorrance respectfully represents,

First. That he is a resident of the United States and a resident of the State of New York.

Second. That a citation has been served upon said Ira Dorrance dated the 26th day of December 1901 requiring him to attend the probate of the will of Caroline Holley above named.

Third. He now shows that he is one of the heirs-at-law of said Caroline Holley and his interest will be injuriously affected by the allowance of said pretended last will and testament to be admitted to probate by this honorable court; wherefore he prays leave to file this his caveat against said will and ask- that he may be heard thereon before any further or other order is made in the premises.

Fourth. And for grounds of objection against said pretended will he avers and shows that in his belief (1) the said paper-writing is not the last will and testament of said deceased, (2) that said Caroline Holley was not at the time of her death or at any time a resident of the city of Washington, in the District of Columbia. (3.) That the instrument here propounded as the last will of Caroline Holley is conditioned for its validity upon the happening of an event which did not take place. (4.) That as Caroline Holley deceased went on the journey referred to in the instrument here offered for probate on or about August 31st, 1901 and afterwards returned to the city of Washington, in which said city she died in or during the month of December 1901 the instrument here propounded is not her will. (5.) That the said alleged will of said Caroline Holley is not her free act and deed but was executed under the influence of the importunities suggestions and persuasions of one La Fayette B. Eaton, or some other person or persons and is not the voluntary act of said deceased Caroline Holley. (6.) That the alleged instrument purporting to be the will of said Caroline Holley was procured by fraud, misrepresentation and artifice by one La Fayette B. Eaton or some other person or persons. (7.) The said paper-writing is not in accordance with the terms of the statute in such case made and provided. (8.) The said paper-writing is not in accordance with law.

Wherefore your petitioner prays;

That the said paper-writing may be refused probate.

That issues may be framed between these caveatees and contestant and the proponents of the alleged will and tried by a jury in order to determine the allegations of fact bearing upon the validity of said will.

That the court may grant such other and further relief as the nature of the case may require.

IRA DORRANCE.

5 STATE OF NEW YORK, } ss:
County of Orange, }

I, Ira Dorrance, do solemnly swear that I have read the foregoing petition by me subscribed and know the contents thereof, and that the facts therein stated of my personal knowledge are true, and that those stated upon information and belief, I believe to be true.

IRA DORRANCE.

Subscribed and sworn to before me this 3rd day of February, 1902.

WILLIAM J. BURKE,
Notary Public.

STATE OF NEW YORK, } ss:
Orange County Clerk's Office, }

I, William G. Taggart, clerk of said county, and the county court of said county (a court of record), do hereby certify that William J. Burke whose name is subscribed to the annexed affidavit [SEAL.] was, at the time of taking the same, a notary public in and for said county, duly commissioned and sworn and having full power to take the same; and further, that I am well acquainted with the handwriting of said notary, and verily believe that the signature subscribed to the said affidavit is genuine.

In witness whereof, I have hereunto subscribed my name, and affixed the seal of said court and county, this 3rd day of Feb'y 1902.

W. G. TAGGART, *Clerk.*

(Endorsement: Caveat. Filed Feb. 4th, 1902. Louis A. Dent, register of wills, D. C., clerk of probate court.)

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of CAROLINE HOLLY, Deceased. Probate No. 10544, Doc. 29.

Harrison H. Brown, one of the next of kin of Caroline Holly, deceased, answering the amended petition of Lafayette B. Eaton, duly filed herein, shows to the court as follows:

First. Denies each and every allegation in said amended petition contained, except as hereinafter specifically admitted.

Second. Has no knowledge or information as to the amount or value of the estate left by the said Caroline Holly, and therefore de-

nies that there is no other property than that referred to in paragraph 6 of said amended petition.

Third. Admits that the said Caroline Holly at the time of her death had an interest in lands in the city of Washington, but has no knowledge of the amount or value of the same.

Fourth. Denies paragraph 7 of said amended petition, and
6 avers that the residence of the said Caroline Holly was at all times in Bloomingburgh, Sullivan county in the State of New York.

Fifth. Avers that after making the paper-writing referred to in paragraph 4 of said amended petition the said Caroline Holly returned to the city of Washington, and that therefore the said paper-writing purporting to be the last will and testament of said Caroline Holly became null and void and has no legal existence.

Wherefore, the said Harrison H. Brown prays that the amended petition of said Lafayette B. Eaton be denied, with costs, and for such other and further relief in the premises as to this court may seem just and equitable.

H. H. BROWN.

STATE OF NEW YORK, } ss:
County of Orange, }

I, Harrison H. Brown, do solemnly swear that I have read the foregoing answer by me subscribed and know the contents thereof, and that the facts therein stated of my personal knowledge are true, and that those stated upon information and belief, I believe to be true.

H. H. BROWN.

Subscribed and sworn to before me this 22" day of March, 1902.

GEORGE W. COLLARD,
[SEAL.] *Notary Public.*

(Endorsement: Answer of H. H. Brown to amended petition, Filed Apr. 15, 1902, Louis A. Dent, register of wills, D. C. clerk of probate court.)

In the Supreme Court of the District of Columbia.

In re Estate of CAROLINE HOLLEY, Deceased. Administration No. —.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause that for the purposes of the hearing in the probate court, to be held April 25, 1902, on the petition of L. B. Eaton to admit a certain paper-writing to probate as the last will and testament of Caroline Holley, and for no other purpose, as follows:

1. That the paper-writing filed as said will is in the handwriting of the deceased, and that it was signed by her on the 31st day of August, 1901.

2. On the first day of September she took a journey to the Buffalo exposition, through Canada, back through the Adirondacks, and then to Washington, D. C., where she resumed her occupation as clerk in the Treasury Department, and died December 17, 1901, at Washington, D. C.

R. F. DOWNING,
Attorney for Contestants.

7 The above statement of facts is admitted to be correct, though there are also other material facts in the view of the proponent of the paper.

J. ALTHEUS JOHNSON,
Of Counsel for Eaton, the Proponent.

April 25, '02.

(Endorsement: Stipulation of counsel, Filed Apr. 5, 1902, Louis A. Dent, register of wills, D. C. clerk of probate court.)

In the Supreme Court of the District of Columbia.

In re Estate of CAROLINE HOLLEY, Deceased. Administration No. 10544.

This cause coming on to be heard on the petition and amended petition of Lafayette B. Eaton, the caveat thereto, the answer to said amended petition by Harrison H. Brown, one of the next of kin of the said Caroline Holley, the stipulation of counsel filed in said cause, and the other papers, and the case having been argued by counsel on both sides, and submitted to the court, it is this 21st day of May, 1902, adjudged, ordered and decreed that the paper-writing propounded as the last will and testament of Caroline Holley be, and the same is hereby, refused probate and record, and the petition of Lafayette B. Eaton is hereby dismissed with costs.

And from this decree the petitioner, Lafayette B. Eaton, the proponent of the said paper-writing, and representing the interests involved in said paper-writing, in open court prays an appeal to the Court of Appeals of the District of Columbia, and said appeal is allowed, and the appeal bond to cover costs is fixed at one hundred dollars.

JOB BARNARD, *Justice.*

(Endorsement: Order refusing probate and record to paper-writing propounded by Lafayette B. Eaton as last will and testament, and dismissing petition. Filed, May 21, 1902, Louis A. Dent, register of wills, D. C. clerk of probate court.)

In the Supreme Court of the D. C., Special Term for Orphans' Ct. Business.

In re the Estate of CAROLINE HOLLEY, Dec'd. No. 10544, Doc. 29.

The register will make the transcript of the record in this case for the Court of Appeals, D. C., to which an appeal has been taken, putting into the transcript the following matter, namely;—

The amended petition, the will, the caveat, the answer to the amended petition, the stipulation of counsel and the decree refusing probate of the will.

J. ALTHEUS JOHNSON,
Of Counsel for Proponent of Will.

8 I agree to the above order.

R. F. DOWNING,
Attorney for Contestants.

(Endorsement: Order for transcript for Court of Appeals, D. C. Filed May 21, 1902, Louis A. Dent, register of wills, D. C. clerk of probate court.)

Form No. 93.

DISTRICT OF COLUMBIA, *To wit:*

Supreme Court of the District of Columbia, Holding a Probate Court.

I, John R. Rouzer, deputy register of wills for the District of Columbia, clerk of the probate court, do hereby certify the foregoing pages, numbered from 1 to 14, inclusive, to be true copies of the originals of certain papers on file in the office of the register of wills, clerk of the probate court, in case No. 10,544, estate of Caroline Holley, deceased, wherein Lafayette B. Eaton, — appellant, and Harrison H. Brown, appellee, the same constituting a full, true, and correct transcript of record of proceedings had in said cause according to the stipulation of counsel filed therein and made a part hereof.

I further certify, that the bond for appeal, in the penalty of one hundred dollars, was duly filed by said appellant, and approved by said court on the 22nd day of May, A. D. 1902.

In testimony whereof I hereunto subscribe my name and affix the seal of the said probate court this 28th day of May, A. D. 1902.

{ Seal Supreme Court of the District of Columbia, Probate Jurisdiction. }

JOHN R. ROUZER,
Deputy Register of Wills for the District of Columbia,
Clerk of the Probate Court.

Endorsed on cover: District of Columbia supreme court. No. 1225. La Fayette B. Eaton appellant vs. Harrison H. Brown *et al.* Court of Appeals, District of Columbia. Filed Jun- 9 1902 Robert Willett, clerk.

9 TUESDAY, *October* 14*th*, *A. D.* 1902.

LA FAYETTE B. EATON, Appellant,
vs.
HARRISON H. BROWN and IRA DORRANCE. } No. 1225.

The argument in the above entitled cause was commenced by Mr. J. Altheus Johnson attorney for the appellant, and was continued by Mr. Rossa F. Downing attorney for the appellees, and was concluded by Mr. Joseph A. Burkart attorney for the appellant. Counsel on both sides allowed to file additional briefs.

10 LA FAYETTE B. EATON, Appellant,
vs.
HARRISON H. BROWN and IRA DORRANCE. } No. 1225.

Opinion.

Mr. Justice MORRIS delivered the opinion of the court:

This is an appeal from an order of the supreme court of the District of Columbia sitting in special term for orphans' court business, whereby probate was refused to a paper writing of a testamentary nature and costs were awarded against the proponent thereof.

The facts of the case, as they appear from the record, are these. One Caroline Holley, formerly a resident of Bloomingburgh, in the State of New York, but since the year 1883 a resident of the District of Columbia and employed here in the Treasury Department of the United States, died in this city on or about the 17th day of December, A. D. 1901, being then about the age of 70 years. After her death there was found among her papers a document of a testamentary nature, wholly in her own handwriting, and bearing date on August 31, 1901, and which in her own peculiar terms and somewhat incorrect spelling and language is as follows:

"WASHINGTON, D. C., *Aug.* 31*st*, /001

"I am going on a Journey and may not ever return. And if I do not, this is my last request. The Mortgage on the King House, which is in the possession of Mr H H Brown to go to the Methodist Church at Bloomingburgh. All the rest of My properday both real and personal to My adopted Son L. B. Eaton of the life Saving Service, Treasury Department Washington D. C. All I have is my one hard earnings and and I propose to leave it to whome I please.

(Signed) CAROLINE HOLLEY."

It appears that on September 1, A. D. 1901, the said Caroline Holley took a journey to the Buffalo exposition, which is presumed to be the journey referred to in the paper; that she went through Canada, came back through the Adirondacks, and then returned to

Washington, where she resumed her occupation as a clerk in the Treasury Department, and died in this city, as already stated, on December 17, 1901.

There was no executor named in the alleged will; and L. B. Eaton, the appellant and the residuary legatee and devisee named therein, thereupon filed the paper in the office of the register of wills for this District, and also filed a petition for its admission to probate as a will merely of personal property, it being apparent that in the absence of attesting witnesses it could not be sustained as a will of real estate. In the appellant's petition it is averred that the decedent left personal property of the value of about $5,500, and an indefinite interest in some land in this city; that there was no other paper of a testamentary nature found among her effects; and that, during the last two or three months of her life, she often spoke of having made her will, that it was among her papers, and that it showed how she wanted her property to go. It is alleged further that she had repeatedly stated during the last two or three years of her life that it was her intention to leave whatever property she possessed at the time of her death to the petitioner La Fayette B. Eaton and the Methodist church at Bloomingburgh, in the State of New York, where, it is alleged, her body, after her death, was taken for burial.

The next of kin of the deceased appear to have been some cousins. Ten of them are mentioned in the appellant's petition to whom citations were issued. Two of these, the appellees here, filed caveats to the probate of the alleged will. Besides the usual grounds of fraud, undue influence, misrepresentation, and irregularity in the execution of the alleged will, and the further ground that Caroline Holley was not at the time of her death or at any time a resident of the District of Columbia, it was objected by the caveators that, as the alleged will was conditioned for its validity upon the happening of an event which never took place, namely, her failure to return from her then projected journey, the paper never went into effect as a will. There is no opinion of the learned justice who heard the cause in the court below to be found in the record before us; but it seems to be conceded on both sides that his decision was based on this last-mentioned objection, which he sustained. The decree rendered by him recites that the cause was heard "on the petition and amended petition of La Fayette B. Eaton, the caveat thereto (presumably meaning the caveat to the alleged will), the answer to said amended petition by Harrison H. Brown, one of the next of kin of said Caroline Holley, the stipulation of counsel filed in said cause (which was to the effect that the paper writing in question was in the handwriting of the deceased, and that it had been signed by her on August 31, 1901, and that on the 1st of September, 1901, she had gone on the journey mentioned, and had thereafter returned to Washington and resumed her usual occupation, dying there, as stated, on December 17, 1901) and the other papers (which however do not appear in the record before us); and it refused probate and

record to the paper writing in question, and dismissed the petition, with costs."

11 From this decree or decretal order the petitioner La Fayette B. Eaton has appealed.

The assignments of error are three in number:

(1.) That it was error to hold the words in the paper concerning a journey as constituting a condition precedent to the operation of the writing of a will, instead of being merely an expression of the inducement for making the will.

(2.) In holding that no testimony was admissible to show that these words did not constitute a condition, and that the paper was of a testamentary character.

(3.) That it was error to adjudge costs against the petitioner Eaton individually.

1. The second of these assignments of error we must dispose of summarily with the statement that there is nothing in the record before us to show that the question of the admission of testimony to qualify or explain the paper was raised in the court below or was decided by it. There is no offer in the record to adduce such testimony. The only reference which we find to anything of the kind is the statement contained in the amended petition to the effect that, during the last two or three months of her life, the deceased had often spoken of having made her will, and that it was among her papers; and that, during the last two or three years of her life, she had often spoken of its being her intention to leave her property to the appellant Eaton and to the Methodist church at Bloomingburgh. But these allegations are all denied by the answer; and, as we have said, there was no offer of proof to sustain them. Moreover, it is not apparent to us how, in the face of the elementary rule of evidence that oral testimony is not admissible to vary or contradict the terms of a written instrument, any such statements as are here indicated could be received to explain away and to nullify the express language of the paper writing before the court.

2. The first assignment of error brings up for review the only substantial question in the case—whether the paper writing in question became a nullity by reason of the failure of the apparent condition upon which it was to become effective; or whether what appears to be a condition was in fact and in legal intendment only the expression of the inducement operating upon the mind of the writer to make the alleged will. And this question we think was rightly determined by the court below by the decree which it made.

Undoubtedly unless we are prepared to repudiate the overwhelming weight of authority and to hold that there can be no such thing as a conditional will, that is, an instrument of writing limited to go into effect as a testamentary disposition of property only upon the happening of some specified contingency, and not otherwise, the document in this case purporting to be the will of the deceased Caroline Holley can not be sustained as now valid and operative. If the words used in it as a preamble do not constitute a condition upon which the document is to become effective, we find it impossi-

ble to say what words could have been used for the purpose. The statement is that, if she does not return from the journey on which she was then about to enter, the paper writing was then to be taken as her last request; that is, as her last will and testament. The converse of the proposition is, that, if she did return, then it was not to be her last will and testament. Language could not well be plainer than this. And as she did return, it is very clear that the paper thereafter ceased to have any effect as a testamentary disposition of her estate.

It is open to us, of course, to speculate that she did not mean this, but something directly the reverse of it. But wills can not be established upon mere speculation that parties did not mean what they said. It is difficult to see why such conditions should be inserted in papers of a testamentary character, when the same result could be had by the execution of another will upon the determination of the specified contingency, or by the destruction or cancelation of the paper. But it is idle to speculate on the actuating motives of parties in their testamentary dispositions. Nowhere, perhaps, are the vagaries of human nature more distinctly evidenced than in the matter and the manner of wills and testaments, especially when these documents are written by the parties themselves, or by persons ignorant of the law. It is often difficult to determine what they mean, or to deduce a coherent and rational purpose from them. But the difficulty would be increased a thousand fold, if courts allowed themselves to go outside of the written instruments, opened the door to oral testimony, and established wills upon speculation as to what was the real intention of the parties irrespective of the written document. No doubt that real intention is sometimes frustrated by the application of this rule of construction. But it was said long ago in this connection—*voluit, sed non dixit*—he may have so intended, but he has not said so—and we are bound by the writing.

The conclusion reached by the court below is sanctioned by the apparently unanimous current of legal authority in England, and by the great preponderance of decision in America. With great industry, learning and ingenuity the principal cases on the subject have been cited and considered in the brief filed on behalf of the appellees in this case. Among them are Parsons *v.* Lanoe, 1 Ves. Sr. 190; Sinclair *v.* Hone, 6 Ves. Jr. 607; *In re* Winn, 2 Perry and Davison, 47; Roberts *v.* Roberts, 8 Jur. (N. S.) 220; *In re* John Porter, L. R. 2 Perry and Davison, 22; *In re* Robinson, L. R. 2 Perry and Davison, 171; Lindsay *v.* Lindsay, L. R. 2 Perry and Davison, 449; *In re* Ward, 4 Haggard, 176; *In re* Todd, 2 Watts and Sergeant (Pa.) 145; Morrow's Appeal, 116 Pa. 440; Wagner *v.* McDonald, 2 Harris and J. 346; Maxwell *v.* Maxwell, 3 Met. (Ky.) 101; Dougherty *v.* Dougherty, 4 Met. (Ky.) 25; Robnett *v.* Ashlock, 49 Mo. 171; Magee *v.* McNeill, 41 Miss. 17. See, also Jarman on Wills, vol. I, p. 17; and Schouler on Wills, p. 285.

In the leading case of Parsons *v.* Lanoe, 1 Vesey, Sr. 190, before Lord Chancellor Hardwicke, the words used were almost identical

in their import with those used in the present case. They were: "*In case* I should die before I return from the journey I intend, God willing, shortly to undertake for Ireland, my will and desire is, etc., etc." It appeared also in that case, somewhat similar to the
12 present, that the testator in his last illness had told some of the persons around him that his will would be found in a certain designated place, where the paper offered for probate was subsequently found, and that he had frequently alluded to it as his will. He returned from Ireland, and died some time afterwards. Lord Hardwicke, in disposing of the case, said:

"I am of opinion that the disposition is a contingent provision, and I think no part was intended to take effect, except he died before his return."

And he held also that oral testimony was not admissible to explain or vary the words of the writing.

In the case *In re* John Porter, L. R. 2 P. & D. 22, where the words used were: "Should anything unfortunately happen to me while abroad, etc., etc.," and which were held to make the will conditional, the distinction was pointed out between words of condition and words which simply express the reason and the occasion for making the will; and it was stated that, if by any reasonable interpretation, the language can be construed as referring to the apprehended occurrence as merely the reason for making the will, it should be so construed, and the will should not be regarded as conditional. And the current of modern authority, as claimed on behalf of the appellant, is strongly in favor of this proposition. In pursuance of this view the cases were decided of Bradford *v.* Bradford, Likefield *v.* Likefield, 82 Ky. 595; French *v.* French, 14 W. Va. 459; *In re* George Thorne, 4 Swabey and Tristram, 36; *In re* Dobson, 1 Perry & D. 88; *In re* Lindsay, 2 Bradf. (N. Y.) 204; Thompson *v.* Connor, 3 Bradf. (N. Y.) 366; Skipwith *v.* Cabell, 19 Grattan, 758; Cody *v.* Conly, 27 Grattan, 313. Of these probably the cases of Likefield *v.* Likefield and French *v.* French are the strongest in support of the appellant's contention.

In the case of Likefield *v.* Likefield the court of appeals of the State of Kentucky had before it a testamentary paper, which was in these words:

"If any accident should happen to me that I die from home, my wife Julia Ann Likefield shall have everything I possess, the house and lots and money that is due to me, and for her to hold it as her own."

And it held: "The rule is that courts will not incline to regard a will as conditional if it can reasonably be held that the maker was simply expressing his inducement to make it, however inaccurate the language may be for that purpose, if strictly construed; and unless the words clearly show that it was intended to be temporary or contingent, it will be upheld. * * * While the word *if* is an apt one to express a condition, yet the language used is so general in character that it shows that the testator intended it as words of *inducement* to the making of the will only, and not that the disposi-

tion of his property should depend merely upon the place of his death."

In the case of French *v.* French the words used by the testator were: "Let all men know hereby, that if I get drowned this morning, March 7, 1872, I bequeath all my property, personal and real, to my beloved wife, Florence." He was about to go on a journey on the day mentioned, which required the fording of a swollen stream near his place of residence, and from which his wife tried to dissuade him. He accomplished the journey in safety, and did not die until nearly three years afterwards. The writing specified was then presented for probate as his will; and the court of appeals of the State of West Virginia said in regard to it:

"It seems that it is now an established principle that, while a person may make a conditional will, his intention to do so must appear clearly. The question is, whether the contingency is referred to as the reason or the occasion for making the disposition, or as the condition upon which the disposition is to become operative."

And further on it said: "The language can be reasonably interpreted and construed to mean that he refers to the calamity and the time during which it may happen as the reason for making said paper writing, and not as the condition upon which the disposition of the property is to become operative; and the will should be interpreted as though it read,—'Lest I get drowned this morning; or lest I die this morning.'"

These cases have not received unqualified approval. The cases of French *v.* French, *In re* Dobson, and *In re* Martin were cited by the court of appeals of Maryland in the case of Kelleher *v.* Kernan, 60 Md. 440, 446, 447, where it was said of them: "Without committing ourselves to full approval of these several decisions under their respective circumstances and language employed, we refer to them as vastly stronger cases for holding the will contingent than this one, and where they were held not contingent." In the case of Kelleher *v.* Kernan it was significantly remarked that the paper writing there at issue "evidently embodied what the testator wanted *in any event* to be done with his property." The cases of Likefield *v.* Likefield and French *v.* French were cases in which the wills were made by husbands in favor of their wives, a disposition which they would probably have made of their respective estates in any event; and it is evident in both cases that the testator contemplated the propriety of making wills in view of the possible nearness of death, and did not intend the testamentary disposition to be specifically contingent upon the issue of the journeys upon which they were at the time about to enter.

In the case now before us there is no specific reference whatever to the matter of death, except by implication. Neither dying nor death is mentioned. The sole statement is that the testatrix might never return from the journey which she was about to undertake. It is quite consistent with her circumstances that if she did return, she might have made some other disposition of her estate. At all

events we find nothing in the words which she used which would remove them from the category of conditional limitations.

It may well be that in all such cases the parties had no actual intention to make their bequests and devises in the shape of conditional limitations; and that all such conditional limitations should be disregarded, or construed merely as statements of the inducement to the making of the wills at the time, if we would give effect
13 to the real intention of the testators. But, in view of the authorities on the subject, and in view of the danger of wandering beyond the letter of the will in order to seek the intention, we are constrained to hold that, in consequence of the words of the preamble and the failure of the contingency on which the testamentary paper in question was to become operative, that paper is now of no effect. And we think that the court below was right in so holding.

3. An assignment of error is based upon the adjudication of costs against the appellant. But it does not appear that the question was in any manner raised in the court below, as might well have been done. For this reason, and because the matter of costs is mainly in the discretion of the court below in proceedings in the probate court, although it may be noticed incidentally on appeal (Canter *v.* Insurance Co., 3 Pet., 307; United States *v.* The Malek Adhel, 2 How., 210; Tuohy *v.* Hanlon, 18 D. C. App., 225, 230, and cases there cited), we cannot assume that the decision was erroneous in this regard, when we find no other reason to disturb it. Nor would we have deemed it proper to disturb it, if the decision had been the other way, and the court had awarded the costs to be paid out of the estate.

We find no error in the decision of the probate court in the premises; and it follows, therefore, that the order appealed from should be affirmed, with costs.

And it is so ordered.

14 TUESDAY, *November 4th, A. D.* 1902.

LA FAYETTE B. EATON, Appellant.
vs.
HARRISON H. BROWN and IRA DORRANCE. } No. 1225. October Term, 1902.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the order of the said supreme court, in this cause, be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE MORRIS.

November 4, 1902.

15 WEDNESDAY, *November 5th, A. D.* 1902.

LA FAYETTE B. EATON, Appellant,
vs.
HARRISON H. BROWN and IRA DORRANCE. } No. 1225.

On motion of Mr. J. A. Johnson of counsel for the appellant, it is ordered by the court that an appeal and writ of error to remove this cause to the Supreme Court of the United States, be, and the same are hereby, allowed, and bond on said appeal and writ of error is hereby fixed at the sum of three hundred dollars: Bond to act as supersedeas is fixed at ten thousand dollars.

16 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between La Fayette B. Eaton, appellant, and Harrison H. Brown and Ira Dorrance, appellees a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Seal Court of Appeals, District of Columbia.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 5th day of November, in the year of our Lord one thousand nine hundred and two.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

17 (*Bond on Appeal.*)

Know all men by these presents, that we, La Fayette B. Eaton, as principal, and the American Bonding and Trust Company of Baltimore as surety, are held and firmly bound unto Harrison H. Brown and Ira Dorrance in the full and just sum of three hun-

dred dollars, to be paid to the said Harrison H. Brown and Ira Dorrance, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixth day of November, in the year of our Lord one thousand nine hundred and two

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said court, between La-yette B. Eaton and the said Brown and Dorrance, to wit, the cause numbered 1225 on the docket of the said court, a decree was rendered against the said La Fayette B. Eaton and the said Eaton having sued out a writ of error and prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Harrison H. Brown and Ira Dorrance citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, that if the said La Fayette B. Eaton shall prosecute said writ of error and appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

L. B. EATON. [SEAL.]
LA FAYETTE B. EATON. [SEAL.]
AMERICAN BONDING COMPANY OF BALTIMORE, [SEAL.]
By THOS. J. DE LASHMUTT, [SEAL.]
Attorney-in-fact. [SEAL.]

[Seal of American Bonding Company of Baltimore.]

Sealed and delivered in presence of—

JOS. A. BURKART.

Approved by—

R. H. ALVEY,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] 1225. La Fayette B. Eaton, appellant *vs.* Harrison H. Brown and Ira Dorrance. Bond on writ of error and appeal to Supreme Court United States. Court of Appeals District of Columbia Filed Nov. 19, 1902 Robert Willett, clerk.

18 UNITED STATES OF AMERICA, *ss:*

To Harrison H. Brown and Ira Dorrance, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein La Fayette B. Eaton is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable R. H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 19th day of November, in the year of our Lord one thousand nine hundred and two.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged this 20th day of Nov., 1902.

R. F. DOWNING,
Att'y for Appellees.

[Endorsed:] Court of Appeals, District of Columbia. Filed Nov. 20, 1902. Robert Willett, clerk.

19 UNITED STATES OF AMERICA, *ss:*

To Harrison H. Brown and Ira Dorrance, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein La Fayette B. Eaton is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable R. H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 19th day of November, in the year of our Lord one thousand nine hundred and two.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged this 20th day of Nov., 1902.

R. F. DOWNING,
Att'y for Defendants in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Nov. 20, 1902. Robert Willett, clerk.

20 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 19, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of La Fayette B. Eaton, appellant, *vs.* Harrison H. Brown and Ira Dorrance, No. 1225, October term, 1902, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 26 day of November, A. D. 1902.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18754. District of Columbia Court of Appeals. Term No. 171. Lafayette B. Eaton, appellant & plaintiff in error, *vs.* Harrison H. Brown and Ira Dorrance. Filed December 17, 1902. File No. 18754.